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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 441.

AVON SHOE CO., INC. and HAYMAKER SHOE CORP.,

Petitioners,

against

DAVID CRYSTAL INC., HAYMAKER SPORTS, INC., *et al.*,

PETITIONERS' REPLY TO RESPONDENTS' BRIEF.

Respondents' brief, in opposition to the Petition for a Writ of Certiorari, misconceives the nature thereof and injects an irrelevant discussion of the factual issues, to support the respondents' conclusion (Resp. Br. p. 12) that the question presented by the Petition, "rests upon reversal by the Court of Appeals of certain fact findings of the District Court which should not have been disturbed" (infra pp. 17-21). We shall not dignify this obvious attempt to reargue the facts and to obfuscate the basic issues, presented by the Petition, by replying thereto.

Petitioners respectfully insist that the affirmance of the District Court's denial of injunctive relief, after the Court of Appeals had reversed one of its critical findings (on the likelihood of confusion between related goods identically trademarked), and had directly criticized others, has resulted in an interpretation of the Lanham Act which is inconsistent with the interpretations of other Circuits.

In effect, the Court of Appeals for the Second Circuit has now ruled as follows: We have found likelihood of confusion on closely related goods, but, despite the plain language of the Lanham Act, 15 U. S. C. A. 1114 (1) entitling Petitioners to relief on that basis, we go further—We insist that Congress has not expressed its intent clearly and that in our Circuit, at least, Petitioners must also establish the possibility of future expansion into Respondents' field (i.e., actual competition in the likely future) or that Respondents' activities may taint or tarnish Petitioners' mark. We respectfully submit that the statutory test of likelihood of confusion as prescribed by the Lanham Act, read literally, liberally or otherwise has thus been rendered meaningless. No other Circuit Court has appended any such requirement to that section of the Lanham Act and other Circuit Courts have clearly indicated that they do not subscribe to such views. Respondents' labored attempts to distinguish the facts of the cases, cited in the Petition for Certiorari, which establish the conflict among the Circuits in the interpretation of this basic provision of the Lanham Act, neither detracts from nor disproves the existing conflict.

A startling indication of the effect of the decision of the Circuit Court in the instant case is evidenced by the recent decision of the District Court for the Southern District of New York in *Triumph Hosiery Mills Inc.* v. *Triumph International Corp. et al.*, decided July 15, 1960, 126 U. S. P. Q. 233. There, in reliance on the instant decision of the Circuit Court, a motion for a preliminary injunction was denied, because "the plaintiff does not market goods which compete with defendants", the Court saying:

> "I have not at all mentioned likelihood of confusion. This has not resulted from inadvertence but from

the fact that, under the circumstances presented, *likelihood of confusion is irrelevant.* In the Avon case the Court of Appeals held that likelihood of confusion had been established. Nevertheless an injunction was denied. As I have pointed out above, the position of the defendants comes squarely within the rationale of the Avon Case." (italics added)

Carried to its logical extreme, if under the decision of the Court of Appeals in the instant case, likelihood of confusion is no longer relevant, then Congress has not "in rather plain language created a right of action whenever an unauthorized use of a registered mark is likely to cause confusion or mistake or to deceive purchasers as to the source of origin" as was said, in *Time Life Inc.* v. *Life Television*, 123 F. Supp. 470, 476. A Supreme Court pronouncement on this significant feature of the Lanham Act is, as all commentators say, and as we respectfully submit now, essential.

Respectfully submitted.

LUDWIG M. WILSON,
MAX BLOCK, JR.